IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 05/04/2004

Coram

The Hon'ble Mr. Justice P. SATHASIVAM
and
The Hon'ble Mr. Justice S.R. SINGHARAVELU

Criminal Appeal No. 363 of 2004

Paranthaman,
S/o Kasi Viswanathan,
Aged 55 years, presently
lodged in Central Prison, Chennai. .. Appellant/Petitioner.

-Vs-

State represented by
Assistant Commissioner of Police,
Law and Order,Adyar Range, Chennai
(E4-Abhiramapuram P.S.Cr.No. 1417/2002) .. Respondent/Respondent.

Criminal Appeal filed under Section 34 (4) of the Prevention of Terrorism Act,2002 against the order of the Special Judge, Special Court under the Prevention of Terrorism Act, Poonamallee dated 06-02-2004 in Crl.M.P.No. 114 of 2003 rejecting the application for bail.

!Mr. K. Chandru, Senior counsel for Mr. R.
R. Yashodvardhan:- For Appellant.

^Mr. I. Subramanian, Public Prosecutor:-
For Respondent.

:JUDGMENT

(Judgment of the Court was made by P. Sathasivam, J.,)

This appeal is directed against the order of the Special Court under the Prevention of Terrorism Act, Poonmallee, Chennai dated 6-2-2004 made in Crl.M.P.No. 114 of 2003 in and by which the learned Special Judge rejected the application for bail.

2. The appellant has been charged for alleged offences under Section 21(3) punishable under Section 21 (4) of Prevention of Terrorism Act, 2002 (hereinafter referred to as "POTA"), Section 4(b)(1) and 5 (a) of the Explosive Substances Act, 1908 and Section 17 (1) of the Criminal Law

Amendment Act, 1908. The Abhiramapuram Police Station has registered the First Information Report on 6-9-2002 for the aforesaid offences.

3. The brief facts which are required for the disposal of the above appeal are stated hereunder:
Tamilar Desiya Iyakkam was declared as an unlawful Association by a notification dated 13-8-2002 under the provisions of the Criminal Law Amendment Act, 1908. By a notification dated 23-8-2002, the premises at New No.33, Narasimhapuram, Mylapore, Chennai-4 was declared as the premises used by the said Association. On 25-8-2002 the said premises was selaed. In an interview to the Satellite Television Channels the appellant is alleged to have stated that there is no war in Sri Lanka and that there was no need for any cooperation from this end, more so since the Srilankan Government was thinking of lifting the ban on LTTE. The appellant is alleged to have stated that if it is a sin to praise the brave struggle of the Tamils, they would continue to commit the same. The appellant had not spoken in support of any terrorist organization nor had he invited support for a terrorist organization. A reference to the brave struggle of the Tamils in Sri Lanka cannot constitute support to any terrorist organization. No offence under the provisions of POTA, 2002 has been made out or committed. Realizing that the speech would not attract the provisions of POTA, some gelatine sticks and electric detonators were planted in the poultry farm of the appellant and a seizure was allegedly made on 6-11 -2002 long after his arrest on 18-9-2002. The appellant is innocent and has not committed any of the offences as alleged. On earlier occasions, the appellant had filed bail applications. As they were rejected, he filed appeals. In view of the recent judgement of the Supreme Court in PUCL v. Union of India, reported in 2004 (1) CTC 241, holding that after one year of detention, the application for bail would be considered under the normal criminal law as found in the Code of Criminal Procedure, the appellant withdrew the earlier appeal and filed a fresh bail application in Crl.M.P.No. 114 of 2003 before the Special Court. The said application was dismissed by an order dated 6-2 -2004 against which the present appeal has been filed.

4. Heard Mr. K. Chandru, learned senior counsel for the appellant and Mr. I. Subramanian, learned Public Prosecutor for respondent.

5. Mr. K. Chandru, learned senior counsel for the the appellant, after taking us through the charges alleged against the appellant, the judgement of the Supreme Court in PUCL v. Union of India [2004 (4) CTC 241] as well as the subsequent orders passed by this Court in the case of Pazha Nedumaran and others and also taking note of the fact that the appellant was in custody from 18-9-2002, namely, more than one year and six months, would contend that the appellant's bail application could be considered under the normal criminal law as found in the Code of Criminal Procedure and the learned Special Judge committed an error in dismissing the same. He also contended that there is no case under POTA and the alleged seizure of gelatine sticks and electric detonators was made in the poultry farm of the appellant on 6-11-2002 i.e., long after his arrest on 18-9-2002, not upon the statement or information given by the appellant. In such a circumstance, even the offences under the Explosive Substances Act and the Criminal Law Amendment Act cannot be

sustained. In any event, according to him, the appellant has no adverse past records, the trial has commenced, he (appellant) is cooperating with the trial of the case and he is in custody for more than 18 months; hence he may be enlarged on bail subject to certain conditions by this Court. On the other hand, Mr. I. Subramanian, learned Public Prosecutor, would contend that the appellant stands in a different footing than the others, since he was not only charged for the offences under POTA, but also under Explosive Substances Act and Criminal Law Amendment Act. He further contended that though prosecution has examined as many as 18 witnesses, except one, the other witnesses are yet to be crossexamined by the appellant. He also contended that considering the punishment for the offences for which he was charged, the appellant is not entitled for bail and that the learned Judge of the Special Court is right in dismissing his petition.

6. We have carefully considered the rival submissions.

7. Before considering the rival contentions, it is relevant to note that as per Section 49 (7) of POTA, where the Public Prosecutor opposes the application of the accused to release on bail, no person accused of an offence punishable under this Act or any rule made thereunder shall be released on bail until the Court is satisfied that there are grounds for believing that he is not guilty of committing such offence. However, the Proviso to sub-section (7) of Section 49 makes it clear that after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of sub-section (6) of this section shall apply. The very same provision, namely, Section 49 of the POTA was challenged before the Supreme Court by People's Union for Civil Liberties and another, and the same was considered in 2004 (1) CTC 241. The conclusion arrived at by the Supreme Court with reference to Section 49 is extracted hereunder: (para 66 to 68)

"66. Section 49 of the Act is similar to that of Section 20 of TADA, constitutional validity of which has been upheld by this Court in Kartar Singh's case [1994 (3) SCC 569:1994 (2) SCR 375 (pages 691-710 of SCC). Challenge before us is limited to the interpretation of Section 49 (6) and (7). By virtue of Section 49 (8), the powers under Section 49 (6) and (7) pertaining to bail is in addition to and not in derogation to the powers under the Code or any other law for the time being in force on granting of bail. The offences under POTA are more complex than that of ordinary offences. Usually the overt and covert acts of terrorism are executed in a chillingly efficient manner as a result of high conspiracy, which is invariably linked with anti-national elements both inside and outside the country. So an expanded period of detention is required to complete the investigation. Such a comparatively long period for solving the case is quite justifiable. Therefore, the investigating agencies may need the custody of accused for a longer period. Consequently, Section 49 (6) and (7) are not unreasonable. In spite of this, bail could be obtained for an accused booked under POTA if the 'Court is satisfied that there are grounds for believing that he is not guilty of committing such offence' after hearing the Public Prosecutor. It is the general law that before granting the bail the conduct of accused seeking bail has to be taken into account and evaluated in the background of nature of

crime said to have committed by him. That evaluation shall be based on the possibility of his likelihood of either tampering with the evidence or committing the offence again or creating threat to the society. Since the satisfaction of the Court under Section 49 (7) has to be arrived based on the particular facts and after considering the above mentioned aspects, we do not think the unreasonableness attributed to Section 49(7) is fair. (See: Kartar Singh's case (1994 (3) SCC 5 69) page 707, para 349-352 of SCC).

Proviso to Section 49 (7) reads as under:
"Provided that after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of sub-section (6) of this Section shall apply."

67. It is contended that this proviso to Section 49 (7) of POTA is read by some of the Courts as a restriction on exercise of power for grant of bail under Section 49 (6) of POTA and such power could be exercised only after the expiry of the period of one year from the date of detention of the accused for offences under POTA. If the intention of the legislature is that an application for bail cannot be made prior to expiry of one year after detention for offences under POTA, it would have been clearly spelt out in that manner in Section 49 (6) itself. Sections 49 (6) and 49 (7) of POTA have to be read together and the combined reading of these two sections is to the effect that Public Prosecutor has to be given an opportunity of being heard before releasing the accused on bail and if he opposes the application, the Court will have to be satisfied that there are grounds for believing that he is not guilty of having committed such offence. It is by way of exception to Section 49 (7) that proviso is added which means that after the expiry of one year after the detention of the accused for offences under POTA, the accused can be released on bail after hearing the Public Prosecutor under ordinary law without applying the rigour of Section 49 (7) of POTA. It also means that the accused can approach the Court for bail subject to conditions of Section 49 (7) of POTA within a period of one year after the detention for offences under POTA.

68. Proviso to Section 49 (7) provides that the condition enumerated in sub-section (6) will apply after the expiry of oneyear. There appears to be an accidental omission or mistake of not including the word 'not' after the word 'shall' and before the word ' apply'. Unless such a word is included, the provision will lead to an absurdity or become meaningless. Even otherwise, read appropriately, the meaning of the proviso to Section 49 (7) is that an accused can resort to ordinary bail procedure under the C ode after that period of one year. At the same time, proviso does not prevent such an accused to approach the Court for bail in accordance with the provisions of POTA under Section 49 (6) and (7) thereof. This interpretation is not disputed by the learned Attorney General. Taking into account of the complexities of the terrorism related offences and intention of Parliament is enacting a special law for its prevention, we do not think that the additional conditions regarding bail under POTA are unreasonable. We uphold the validity of Section 49."

In the light of the interpretation of the Hon'ble Supreme Court with reference

to the above provision, it is clear that sub-sections (6) and (7) of Section 49 have to be read together, that Public Prosecutor has to be given an opportunity of being heard before releasing the accused on bail and that if he opposes the application, the Court will have to be satisfied that there are grounds for believing that he is not guilty of having committed such offences. It is also clear from the said decision that in Proviso to sub-section (7) there appears to be an accidental omission or mistake of not including the word 'not' after the word 'shall' and before the word 'apply'. It is also clear that as per the Proviso to sub-section (7) an accused can resort to ordinary bail procedure under the Code after the expiry of the period of one year. In view of the fact that the appellant is in custody from 18-9-2002 i.e., more than one year, as per Proviso to Subsection (7) and as interpreted by the Supreme Court in PUCL case, we are of the view that the present bail application of the appellant can be considered on par with the other ordinary bail procedure under the Code of Criminal Proceudre.

8. Now we shall consider the allegations made against the appellant as seen from the First Information Report. On 13-8-200 2 taking note of the objects of Tamilar Thesiya Iyyakkam, an organization functioning under Thiru Pa. Nedumaran, President which included support to the objectives of Liberation Tigers of Tamil Eelam and self determination for Tamil Nadu and other States, the Government by Order in G.O.Ms.No. 1/1457-2/2002 dt. 13-8-2002 declared the Tamil Desiya Iyakkam as an unlawful association under the provisions of Section 15 (2)(b) of Section 16 (1) of the Criminal Law Amendment Act, 1908. By G.O.Ms.No.1/457-2/2002 dated 23-8-2002 and Section 17A(1) of Criminal Law Amendment Act (14 of 1908), the premises bearing door No.17/1, (New No.33), Ground Floor, Narasimhapuram, Mylapore, Chennai-4 and 34, West Chithirai Street, Madurai-1 wherein the Tamilar Desiya Iyakkam was functioning were notified by the State Government as places used for the purposes of the above unlawful association. On direction by the Deputy Commissioner of Police, the Assistant Commissioner of Police, Adyar Circle on 25-8-2002 at about 7.50 A.M. proceeded to the premises at No. 17/1 (New No.33), Ground Floor, Narasimhapuram, Mylapore, Chennai-2 wherein the banned Tamilar Desiya Iyakkam was functioning, and took an inventory. On completion of the inventory, the premises was sealed and the sealed premises was taken possession by the police as per the order. Notice regarding sealing was given to two General Secretaries and their signatures obtained. Thereafter, the General secretaries gave interviews to private television channels such as Sun T.V., Raj T.V., Jaya T.V., ND T.V., and Star T.V. During the course of interview, the General Secretary Paranthaman, appellant herein, spoke in support of LTTE (Liberation Tigers Organization), an association declared as unlawful association under the provisions of the Central Enactment, Unlawful Activities (Prevention) Act, 1967. The said complaint was registered by the Abhiramapuram Police and proceeded against the appellant for offences under Section 21 (3) and (4) of POTA. He is also charged under Section 17 (1) of the Criminal Law Amendment Act, 1908. It is also brought to our notice that based on the seizure of gelatine sticks and electric detonators in the poultry farm of the appellant on 6-11-2002, he was also charged under Section 4 (b)(1) and 5 (a) of the Explosive Substances Act, 1908.

9. With reference to the offences under POTA, learned senior counsel for the

appellant has brought to our notice the statement said to have been made by the appellant. According to him, if it is a sin to praise the brave struggle of the Tamils in Sri Laknka they would continue to commit the same and that he had not spoken in support of any terrorist organization. It is further brought to our notice that even the said statement was said to have been made after seizure of his office at New No. 33, Narasimhapuram, Mylapore, Chennai-4. He made the above statement to the Satellite Television Channels. In this regard, learned senior counsel for the appellant by drawing our attention to the relevant portions from the judgement of the Supreme Court in PUCL case (cited supra), contended that Section 21 would not cover any expression or activity which does not have the element or consequence of furthering or encouraging terrorist activity or facilitating its commission. In other words, according to him, mere expression of sympathy does not have the effect to further the activities of terrorist organization or the commission of terrorist act within the mischief of Section 21. We have gone through the relevant discussion of the Hon'ble Supreme Court with reference to Sections 20, 21 and 22 of the Act. It would be more appropriate to refer the following conclusion of Their Lordships: (para 48)

"48.... Offence under Section 3 (1) of POTA will be constituted only if it is done with an 'intent'. If Parliament stipulates that the 'terrorist act' itself has to be committed with the criminal intention, can it be said that a person who 'profess' (as under Section 20) or 'invites support' or 'arranges, manages, or assist in arranging or managing a meeting' or 'addresses a meeting' (as under Section 21) has committed the offence if he does not have an intention or design to furthering or encouraging terrorist activity of any terrorist organization or the commission of terrorist acts? We are clear that it is not. Therefore, it is obvious that the offence under Section 20 or 21 or 22 needs positive inference that a person has acted with intent of furthering or encouraging terrorist activity or facilitating its commission. In other words, these sections are limited only to those activities that have the intent of, encouraging or furthering or promoting or facilitating the commission of terrorist activities. If these Sections are understood in this way, there cannot be any misuse. With this clarification we uphold the constitutional validity of Sections 20, 21 and 22."

Considering the legal position, as interpreted by the Supreme Court in the decision referred to above and the averments alleged against the appellant, particularly the statement said to have been made by him to the Media, we are of the view that the request of the petitioner for bail cannot be rejected without a full-fledged trial. In the light of the observation of the Supreme Court that speech alone would not attract the provisions of POTA, we hold that the claim of the petitioner cannot be rejected.

10. Coming to the charges under Explosive Substances Act, learned senior counsel for the appellant submitted that after knowing that the speech would not attract the provisions of POTA, some gelatine sticks and electric detonators were planted in the poultry farm of the appellant and seizure were made on 6-11-2002, long after his arrest on 18-9-2002. Admittedly, on the date of seizure i.e., on 6-11-2002, no statement was reported to have been made by the appellant to attract Section 27 of the Indian Evidence Act.

Though Sections 25 and 27 of the Indian Evidence Act cannot be relied upon, in the light of section 32 of POTA, a confession made to the Superintendent of Police is admissible. As rightly argued, Section 27 of the Evidence Act has not been obliterated by the provisions of POTA. Section 27 of the Evidence Act emphasises that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. However, where the facts are such as indicating reasonable doubt as regards the guilt of the accused benefit of the same must be availed by him. We have already referred to the fact that even the alleged seizure was made only on 6-11-2002 in the poultry farm of the appellant and that the seizure was long after his arrest on 18-9-2002. In this regard, it is useful to refer the judgement of the Supreme Court in Bahadul v. State of Oriss, reported in AIR 1979 Supreme Court 1262 wherein it was held that, (para 4)

"4.....As there is nothing to show that the appellant had made any statement under Section 27 of the Evidence Act relating to the recovery of this weapon hence the factum of recovery thereof cannot be admissible under section 27 of the Evidence Act....."

11. The following conclusion/observation made by the Supreme Court in Sanjay Dutt v. State (II), reported in (1994) 5 Supreme Court Cases 410 is relevant: (para 19 and 20)

"19. The meaning of the first ingredient of 'possession of any such arms etc., is not disputed. Even though the word ' possession' is not preceded by any adjective like 'knowingly', yet it is common ground that in the context the word 'possession' must mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. There is a mental element in the concept of possession. Accordingly, the ingredient of 'possession' in Section 5 of the TADA Act means conscious possession. This is how the ingredient of possession in similar context of a statutory offence importing strict liability on account of mere possession of an unauthorised substance has been understood. (See Warner v. Metropolitan Police Commissioner (1969) 2 AC 256 and Sambasivam v. Public Prosecutor, Federation of Malaya (1950 AC 458)

20. The next ingredient is that the possession of such an arm etc. should be 'unauthorised' That also presents no difficulty. The unauthorised possession in the context means without the authority of law. There is no dispute even in this area. The difficulty arises only hereafter. The unauthorised possession so understood of such an arm etc. "in a notified area" constitutes the offence. The true import of this last ingredient is the area of real controversy."

12. Learned senior counsel for the appellant has referred to a constitution Bench judgement of the Supreme Court in The State of Madras v. V.G. Row, reported in AIR 1952 Supreme Court 196 wherein the Bench had held that Section 15 (2) (b) as amended in Madras by the Criminal Law Amendment (Madras) Act, 1950, falls outside the scope of authorised restrictions under Cl. (4) of

Art.19 and is, therefore, unconstitutional and void.

13. On a careful analysis of the offences alleged against the appellant, and the interpretation to POTA laid down by the Hon'ble Supreme Court, we have no hesitation to come to a conclusion that the offence under Section 21 of POTA needs positive inference that a person has acted with intent of furthering or encouraging terrorist activities or facilitating its commission and whether the alleged speech which does not support or invite support to any terrorist organization will show that the appellant had not contravened any of the provisions of POTA is known only after a full-fledged trial. Likewise, whether the seizure of gelatine sticks and electric detonators was in conformity with the Evidence At could be gone into only at the time of trial, more particularly in the light of the fact that the arrest was made on 18-9-2002 while the seizure was effected on 6-11-2002 . It is also relevant to note that sanction by the Government was restricted to the offence under Section 21 (3) and punishable under Section 21 (4) of POTA and no sanction had been accorded under POTA for possession of explosive materials. In the light of the judgement of the Supreme Court in PUCL case (cites supra) the ingredients referred to in Section 21 of the POTA will necessarily have to relate to activities which will constitute terrorist acts and threaten the unity, integrity, security or sovereignty of India or strike terror in the people. Whether those elements are available in the charges levelled are to be seen only at the time of trial.

14. It is also relevant to refer a Division Bench decision of this Court in Nedumaran, P. v. State, reported in 2004 (1) CTC 721. The said case relates to charges levelled against P. Nedumaran and 5 others under the provisions of POTA. The Division Bench after referring to various passages from the decision of the Supreme Court in PUCL case (cited supra), grave nature of the charges levelled against the appellants therein and after verifying the character of the persons concerned, enlarged them on bail subject to fulfilling certain conditions. It is also brought to our notice that subsequent to the Division Bench decision, another Division Bench of this Court in Madurai Ganesan v. State of Tamil Nadu, reported in 2004 (1) Law Weekly (Cri) 122, following the judgement of the Supreme Court in PUCL case (cited supra) and judgement of this Court in P. Nedumaran's case (cited supra), set aside the order of the Special judge refusing bail to the appellants therein and enlarged them on bail by imposing certain conditions. There is no dispute that in P. Nedumaran's case [2004 (1) CTC 721] and in Madurai Ganesan's case [2004-1-L.W.(Cri) 122], the appellants were charged under the very same provisions of POTA. No doubt, in addition to those provisions, the appellant was charged for an offence under the Explosive Substances Act following the seizure of gelatine sticks and electric detonator on 6-11-2002. In so far as the charge under the Explosive Substances Act, we have already expressed our view. We are satisfied that the learned Special Judge has not considered the relevant materials, particularly the dictum laid down in the decision of the Supreme Court in PUCL case (cited supra) and also the fact that the appellant was in custody from 18-9-2002, namely, more than 18 months from the date of arrest. As far as the character of the appellant is concerned, except the mere statement to the Satellite or T.V. Media raising his support to the Eelam Tamils, there was no criminal background and

in the absence of any complaint or information that he has nexus with any criminal background, though he appears to be wedded to a particular philosophy but, it cannot be said that he has a shadowy past so as to be deprived of the bail.

15. In the light of our discussion, we set aside the order of the learned Special Judge dated 06-02-2004 made in Crl.M.P.No. 114 of 2003 and enlarge the appellant on bail on the following conditions:-

(i) The appellant shall be released on bail on his executing a bond for a sum of Rs.50,000/- (Rupees Fifty Thousand only) with two sureties each for the like-sum to the satisfaction of the trial court;

(ii) He shall not in any manner keep any connection with the banned organisations like LTTE during the pendency of the trial;

(iii) He shall not address any public meeting during the pendency of the trial;

(iv) He shall desist from giving any interview to any media audio and video or by issuing any press statement encouraging or supporting terrorist organisations, more particularly LTTE during the pendency of the trial;

(v) If he holds Passport, he shall deposit the same with the trial Court;

(vi) He shall not make any attempt to contact any of the prosecution witnesses, directly or through any other person, or in any other way try to tamper with the evidence or influence any witness in this case or any other crime under investigation by any Government agency;

(vii) he shall cooperate for the early completion of the trial and shall attend all the hearings without impeding the progress of the trial;

(viii) Lastly, he shall intimate the place of his residence and shall not change the same without prior intimation to the respondent of his intention to shift elsewhere.

With the above conditions, Criminal Appeal No. 363 of 2004 is allowed.

R.B.

Index:- Yes.
Internet:- Yes.

To

1. The Special Judge, Special Court under the Prevention of Terrorism Act, Poonamallee, Chennai.

2. The Superintendent, Central Prison, Chennai.

3. The Public Prosecutor, High Court, Madras.